SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 388

LOUISE A. CHISHOLM, Individually and as Administratrix of the Estate of Susie A. Hightower, WESLEY G. ANDERSON, and MARIE ANDERSON,
Petitioners,

vs.

DR. R. A. BILLINGS, Co-executor and Trustee under the Will of Dr. George L. Hightower, MISS MOLLIE MYRICK, Individually and as Co-executrix under the Will of Dr. George L. Hightower, REV. A. A. HIGHTOWER, Individually and as Trustee under the Will of Dr. George L. Hightower, MORRIS BROWN COLLEGE, a Georgia Corporation, THE HOWARD UNIVERSITY, a District of Columbia Corporation, COSMOPOLITAN A.M.E. CHURCH, an Unincorporated Association, PHI BETA SIGMA FRATERNITY, INC., a New York Corporation, ZETA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, CHI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, PSI CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association, and LAMBDA SIGMA CHAPTER OF PHI BETA SIGMA FRATERNITY, an Unincorporated Association,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion and judgment of the Supreme Court of Georgia in Chisholm, Administratrix, *et al.* v. Billings Executor, *et al.* has not yet been reported, but is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on April 12, 1965 and the Petitioners' Motion for Rehearing was denied on May 6, 1965.

This Court does not have jurisdiction to review the present cause by a Writ of Certiorari pursuant to 28 U. S. C. Section 1257. It clearly appears from the record in this case that Petitioners have not at any stage of the proceeding in the said case asserted in the trial court or in the Supreme Court of Georgia any claim of a denial or violation and infringement of privileges and immunities or rights under the equal protection clause of the due process clause of the Fourteenth Amendment to the Constitution of the United States, nor does it appear from the record of said case that the Supreme Court of Georgia in its opinion and judgment passed upon or decided any federal question under the Federal Constitution. It is therefore in this Court by petition for a Writ of Certiorari that Petitioners assert, for the first time in said cause, a claim of denial of privileges and immunities under the Federal Constitution.

It is settled doctrine that a claim of denial or violation of privileges and immunities or rights under the Federal Constitution not asserted in the state courts, nor passed upon and decided in the state court will not be considered on a Writ of Certiorari. *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124; *Cleveland and etc., R. Co. v. Cleveland, Ohio*, 235 U.S. 50, 35 S.Ct. 21; *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375; *Edelman v. People of State of Calif.*, 344 U.S. 357, 73 S.Ct. 293; and *Quicksall v. People of State of Mich.*, 339 U.S. 600, 70 S.Ct. 910.

In the Court of first instance, upon the limiting of the taking of depositions by the trial court, no federal or constitutional question was raised by the Petition-

ers. It is also clear that Petitioners had the opportunity to raise and present the Federal question of challenging the ruling and judgment of the trial court in limiting the scope of the taking of depositions on appeal to the Supreme Court of Georgia, and also the opportunity of raising the Federal question upon the ruling and judgment of the Supreme Court of Georgia in refusing to review on appeal the ruling of the trial court on limiting the taking of depositions in the motion for rehearing filed by them, as Petitioners now assert in their Petition for a Writ of Certiorari. This Petitioners did not do. Though they did file a Motion for Rehearing in the Supreme Court of Georgia, they confined themselves to assignments of alleged various errors on the judgment of the Supreme Court under the local law. (See *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, and *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, where this Court said:

> "The settled doctrine is that when a Constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a Motion for Rehearing."

This Court, not having jurisdiction to review this case upon the Writ of Certiorari, may not proceed to a consideration of the merits of the Petitioners' petition for a Writ of Certiorari.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is submitted that this Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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APPENDIX

Opinion of Supreme Court of Georgia dated April 12, 1965

CHISHOLM, ADMINISTRATRIX, et al. v. BILLINGS, EXECUTOR, et al., Case No. 22859 in the Supreme Court of Georgia (decided April 12, 1965):

> "Because petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable, their petition failed to set forth a cause of action and was properly dismissed.

ALMAND, Justice: Louise A. Chisholm, as administratrix of the estate of Susie A. Hightower and as her sister and heir at law, together with a brother and sister of Susie A. Hightower, brought a petition against the executors of the estate of Dr. George L. Hightower, certain named trustees under the will of Dr. Hightower and several named parties who were the beneficiaries of the trust fund set up in the will. It was alleged: that the testator died on March 8, 1963, leaving his wife Susie A. Hightower and no children or descendants of children; that he left a will, which has been probated, executed on December 19, 1962, in which he left more than one third of his estate to charitable uses to the exclusion of his wife; that having died less than 90 days after the execution of the will, the bequests to charity were void under the provisions of Ga. Code Ann. 113-107. It was alleged that his widow was dissatisfied with the bequests to the several charitable organizations and had prepared to consult an attorney, but was prevented from doing so by her sudden death on April 16, 1963. As to the value of the estate it was alleged: 'Upon the probate of the will of Dr. George L. Hightower the defendants, Dr. R. A. Billings and Miss Molly Myrick, co-executor and co-executrix, took into their possession all of the assets of the estate of Dr. George L. Hightower. The

exact nature of these assets are well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by said defendants, however, it is known that said assets exceeded the debts of the estate by a substantial amount.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to the defendants Rev. A. A. Hightower and Dr. R. A. Billings, trustees under the will of Dr. George L. Hightower. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Upon information and belief the petitioners aver that the defendant co-executor and co-executrix have distributed a portion of the assets of said estate to Morris Brown College of Atlanta, Georgia. The exact amount of said assets distributed is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused.' 'Petitioners aver that the will of Dr. George L. Hightower left more than one-third of his estate to charitable, religious and educational institutions. The exact value of that portion left to charitable, religious and educational institutions is well known to the defendants, but unknown to the petitioners, whose demand for an accounting has been refused by the defendants, Dr. R. A. Billings and Miss Mollie Myrick.' The petition sought a construction of the will of the testator and a decree declaring the bequests to the several charitable organizations to be void, an accounting by the executors, and injunctive relief.

The executors and trustees named in the testator's will demurred generally to the petition on the grounds that (a) that petition fails to allege a cause of action for any of the relief prayed for and (b) that none of the petitioners

had legal standing or any legal interest or right to seek a construction of the will for the purpose of having the bequests to charitable uses declared as null and void.

In 1937 the legislature amended Ga. Code 113-107, which then provided: 'No person leaving a wife or child, or descendants of child, shall, by will, devise more than one third of his estate to any charitable, religious, educational, or civil institution, to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.' by adding the following: 'Provided, however, that when the estate shall exceed two hundred thousand dollars in value, the restrictions of this section shall not apply to such excess, and in estimating values of devises that of a life-estate under the annuity tables shall be included.' Ga. Laws 1937, p. 430. It is evident from the caption of this Act and the re-enactment of Ga. Code 113-107 as amended that the proviso was made a part of the enacting clause. This statute restricting or limiting the testamentary power of the testator, being in derogation of the common law, is to be strictly construed. Monahan v. O'Byrne, 147 Ga. 633 (95 S.E. 210); 15 Am. Jur. 2d, Charities, §23 & §24. The proviso of the statute should be considered in connection with the entire act of which it is a part. Board of Education & Orphanage for Bibb County v. State Board of Education, 186 Ga. 200 (7) (197 SE 261). Where an exception or proviso forms a necessary part of the statute in the enacting clause, the party relying upon the statute must allege facts showing that the case under consideration does not fall within the exception or proviso. See cases cited in 41 Am. Jur. §94, p. 355 and the annotation in 130 ALR 441. 'Where a party relies for recovery on a statute, particularly one creating a liability where none existed before, he must state facts

showing his right to recover under that statute, and bring himself clearly, fairly, or substantially within its terms or provisions; and it is necessary that such statement shall include every fact which is essential to the existence of a cause of action under the statute, and show that plaintiff, or the person on whose behalf he sues, is entitled to the benefit and protection of the statute and that defendant is liable thereunder.' 71 CJS §86, p. 201-203. See also Crowley v. Hughes, 74 Ga. App. 531 (40 SE 2d 570).

The petitioners do not allege the amount or value of the estate. Under Ga. Code Ann. 113-107, if the value of the estate exceeded $200,000.00 the restrictions of the section would not apply to the excess. The general allegation that the bequests to charitable organizations were more than one third of the testator's estate is contradicted by other allegations that petitioners do not know the amounts or values of the charitable bequests. Allegations in a petition which are ambiguous, inconsistent or contradictory will be construed most strongly against the pleader. Owen v. Richards Paper Co., 188 Ga. 258(1) (3 SE2d 600); Butler v. City of Dublin, 191 Ga. 551 (13 SE2d 362); Hoffman v. Chester, 204 Ga. 296 (49 SE2d 760). At the most, all that petitioners allege is that they do not know the amount or value of the testator's estate. The petitioners do not allege sufficient facts to show that the proviso of Ga. Code Ann. 113-107 is not applicable. Assuming, but not holding, that the petitioners are such parties that are permitted under Ga. Code Ann. 113-107 to question the validity of the charitable bequest (Beynes v. Brooks, 219 Ga. 140, 143, 132 SE2d 42, 44), we hold that their petition failed to set forth a cause of action and was properly dismissed.

When, as here, a petition fails to state a cause of action for any of the relief sought, and is, for that reason,

dismissed on general demurrer, it is unnecessary for this court to deal with another assignment of error complaining of an antecedent ruling which the trial judge had made in the case respecting practice and procedure. Phillips v. Phillips, 211 Ga. 305(3) (85 SE2d 427). Therefore we do not rule on the assignment of error complaining of the court's order limiting the scope of examination on the depositions which the plaintiffs sought to take under the provisions of Ga. Code Ann. 38-2101 (Ga. Laws 1959, pp. 426-29).

Judgment affirmed. All the Justices concur.

CERTIFICATE OF SERVICE

I, GEORGE E. C. HAYES, attorney for Respondents, do hereby certify that I have this day served counsel for the Petitioners with the required number of copies of this Brief in Opposition to the Petition for Writ of Certiorari by depositing the same in the United States Mail in a properly addressed envelope with sufficient postage attached to carry the same to their destination.

This _____ day of July, 1965.

_____

George E. C. Hayes